



ATTORNEY GENERAL OF TEXAS
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April 11, 2014

Mr. Nick Lealos
Staff Attorney
Office of Agency Counsel
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Texas Department of Insurance
P.O. Box 149104
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OR2014-06081

Dear Mr. Lealos:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 519457 (TDI# 147199).

The Texas Department of Insurance (the "department") received a request for information relating to discipline of specified entities by the department.¹ You claim some of the submitted information is excepted from disclosure under section 552.107 of the Government Code, as well as privileged under rule 192.5 of the Texas Rules of Civil Procedure.² Additionally, you state release of the submitted information may implicate the proprietary interests of OneBeacon Insurance Group, L.L.C. ("OneBeacon"). Accordingly, you state, and provide documentation showing, you notified OneBeacon of the request for information and of its right to submit arguments to this office as to why the submitted information should

¹You state the department sought and received clarification of the information requested. See Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Civil Procedure 192.5, this office has concluded section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from OneBeacon. We have reviewed the submitted information and the submitted arguments.

Initially, we note, and you acknowledge, the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). You inform us the submitted information is part of completed investigations and is subject to subsection 552.022(a)(1) of the Government Code. This information must be released unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* § 552.022(a)(1). You seek to withhold some of the information at issue under section 552.107 of the Government Code. However, section 552.107 is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, information subject to section 552.022(a)(1) may not be withheld under section 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We note you also seek to withhold the information at issue under rule 192.5 of the Texas Rules of Civil Procedure. We will therefore consider your assertions of the attorney-client privilege under rule 503 of the Texas Rules of Evidence and the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure. Because section 552.101 of the Government Code applies to confidential information and sections 552.110 and 552.137 of the Government Code make information confidential under the Act, we will also consider OneBeacon's arguments under these exceptions against disclosure of the remaining information.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the information at issue consists of communications involving attorneys for the department and employees of the department in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the department. You state these communications were confidential, and you state the department has not waived the confidentiality of the information at issue. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue, which we have marked. Accordingly, the department may withhold the marked information under rule 503 of the Texas Rules of Evidence.³ *Cf. Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex.

³As our ruling is dispositive for the information at issue, we need not address your remaining argument against its disclosure.

App.—Austin 2000, pet. denied) (attorney’s entire investigative report protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice).

We now turn to OneBeacon’s arguments against disclosure of the remaining information. OneBeacon argues the information at issue was identified as “proprietary” when submitted to the department and was supplied with the expectation of privilege and confidentiality. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes, such as section 36.252 of the Insurance Code, which provides:

(a) Information or material acquired by the department that is relevant to an investigation is not a public record for the period that the department determines is relevant to further or complete an investigation.

(b) Investigation files are not open records for purposes of [the Act], except as specified herein.

Ins. Code § 36.252. Section 36.251 of the Insurance Code states “investigation file”

means any information collected, assembled, or maintained by or on behalf of the department with respect to an investigation conducted under this code or other law. The term does not include information or material acquired by the department that is:

(1) relevant to an investigation by the insurance fraud unit; and

(2) subject to Section 701.151 [of the Insurance Code].

Id. § 36.251. OneBeacon states the information at issue was submitted in connection with an investigation initiated by the department into OneBeacon’s workers’ compensation claims handling practices. Pursuant to section 36.252 of the Insurance Code, the investigation file

must be withheld under section 552.101 of the Government Code until such time as the department determines the information at issue is no longer relevant to further or complete its investigation. Upon review, we find the remaining information pertains to a completed investigation. Accordingly, we conclude the department may not withhold the submitted information under section 552.101 of the Government Code in conjunction with section 36.252 of the Insurance Code.

Next, OneBeacon states portions of its information are excepted from disclosure under section 552.110(a) of the Government Code. Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts, which holds a trade secret to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.⁴ RESTATEMENT OF TORTS § 757 cmt. b. This

⁴The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).*

office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983). We note pricing information pertaining to a particular contract is generally not a trade secret because it is “simply information as to single or ephemeral events in the conduct of the business,” rather than “a process or device for continuous use in the operation of the business.” RESTATEMENT OF TORTS § 757 cmt. b; *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

OneBeacon asserts portions of its information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude OneBeacon has failed to establish a *prima facie* case that any portion of its information meets the definition of a trade secret. We further find OneBeacon has not demonstrated the necessary factors to establish a trade secret claim for its information. *See* ORD 402. Therefore, the department may not withhold any of OneBeacon’s information under section 552.110(a).

The remaining information contains e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the department must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.⁵

In summary, the department may withhold the information we marked under rule 503 of the Texas Rules of Evidence. The department must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The department must release the remaining information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

⁵We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



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Open Records Division

CVMS/som

Ref: ID# 519457

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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